RECORD AND BRIEFS

No. 16-1144

Supreme Court, U.S.
FILED
APR 21 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CARLO J. MARINELLO, II,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* CAUSE OF ACTION INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

JEFFREY T. GREEN
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street N.W.
Washington, D.C. 20036
(202) 872-8600

JOHN VECCHIONE*
ERICA L. MARSHALL
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
john.vecchione@causeofaction.org

Counsel for Amici Curiae

Counsel of Record

April 21, 2017

272711

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

BRIEF OF *AMICI CURIAE* CAUSE OF ACTION INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER 1

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 4

ARGUMENT 5

I. This Court Should Grant Certiorari because Under the Law in the Majority of Circuits, the "Corruptly" *Mens Rea* Requirement Fails to Limit the Reach of 26 U.S.C. § 7212(a)'s "Omnibus Clause" 5

A. This Court Has Routinely Cabined Omnibus Clauses 6

B. The Definition of "Corruptly" Applied to 26 U.S.C. § 7212(a) Does Not Restrict the Application of the Statute in Any Meaningful Manner 8

Table of Contents

Page

1. Whether the Defendant Had the "Intent to Obtain an Unlawful Benefit" Depends on Whether the Benefit Was Unlawful, Not on Whether the Defendant *Knew* the Benefit Was Unlawful. 9

2. Even Legal Acts or Omissions Can be Criminal.....11

3. The "Unlawful Benefit" Does Not Need to be a Tax Benefit.....12

C. The Prevailing § 7212(a) "Omnibus Clause" Interpretation Swallows the Remainder of the Criminal Provisions of Title 26 and Grants Prosecutors Unfettered Discretion 13

II. The Court Should Grant Certiorari to Vindicate its Ruling in *Aguilar*.....16

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

CASES

Abuelhawa v. United States,
556 U.S. 816 (2009) 18

City of Chicago v. Morales,
527 U.S. 41 (1999) 13

DeCoster v. United States,
No. 16-877 (2017) 2

Dowling v. United States,
473 U.S. 207 (1985) 7

Elonis v. United States,
135 S. Ct. 2001 (2015) 9

Gonzales v. Carhart,
550 U.S. 124 (2007) 9

Gould v. Gould,
245 U.S. 151 (1917) 7

McBoyle v. United States,
283 U.S. 25 (1931) 6-7

McCutcheon v. Fed. Election Comm'n,
134 S. Ct. 1434 (2014) 1

McDonnell v. United States,
136 S. Ct. 2355 (2016) 6

Cited Authorities

Page

Overton v. United States,
No. 15-1504 (2017) 2

Rewis v. United States,
401 U.S. 808 (1971) 7

United States v. Aguilar,
515 U.S. 593 (1995) 6, 16, 17, 21

United States v. Armstrong,
974 F. Supp. 528 (E.D. Va. 1997) 14

United States v. Balint,
258 U.S. 250 (1922) 9

United States v. Biller,
No. 1:06-cr-14, 2006 U.S. Dist.
LEXIS 100493 (N.D. W. Va. July 17, 2006) 11

United States v. Black,
No. CR 12-0002 (N.D. Cal.) 2

United States v. Bostian,
59 F.3d 474 (4th Cir. 1995) 11

United States v. Bowman,
173 F.3d 595 (6th Cir. 1999) 12

United States v. Brennick,
908 F. Supp. 1004 (D. Mass. 1995) 8, 9

Cited Authorities

Page

United States v. Floyd,
740 F.3d 22, 32 (1st Cir. 2014) 3, 13

United States v. Giambalvo,
810 F.3d 1086 (8th Cir. 2016) 12, 13

United States v. Hanson,
2 F.3d 942 (9th Cir. 1993) 9

United States v. Kahre,
No. 2:05-cr-121, 2009 U.S. Dist.
LEXIS 39473 (D. Nev. Apr. 20, 2009) 11

United States v. Kassouf,
144 F.3d 952 (6th Cir. 1998) 3, 5, 17

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998) 3, 8, 9

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016) 4, 8, 11, 18

United States v. Massey,
419 F.3d 1008, 1010 (9th Cir. 2005) 3

United States v. Miner,
774 F.3d 336 (6th Cir. 2014) 3

United States v. Mitchell,
985 F.2d 1275 (4th Cir. 1993) 7

Cited Authorities

Page

Overton v. United States,
No. 15-1504 (2017) 2

Rewis v. United States,
401 U.S. 808 (1971) 7

United States v. Aguilar,
515 U.S. 593 (1995) 6, 16, 17, 21

United States v. Armstrong,
974 F. Supp. 528 (E.D. Va. 1997) 14

United States v. Balint,
258 U.S. 250 (1922) 9

United States v. Biller,
No. 1:06-cr-14, 2006 U.S. Dist.
LEXIS 100493 (N.D. W. Va. July 17, 2006) 11

United States v. Black,
No. CR 12-0002 (N.D. Cal.) 2

United States v. Bostian,
59 F.3d 474 (4th Cir. 1995) 11

United States v. Bowman,
173 F.3d 595 (6th Cir. 1999) 12

United States v. Brennick,
908 F. Supp. 1004 (D. Mass. 1995) 8, 9

Cited Authorities

Page

United States v. Floyd,
740 F.3d 22, 32 (1st Cir. 2014) 3, 13

United States v. Giambalvo,
810 F.3d 1086 (8th Cir. 2016).....12, 13

United States v. Hanson,
2 F.3d 942 (9th Cir. 1993).....9

United States v. Kahre,
No. 2:05-cr-121, 2009 U.S. Dist.
LEXIS 39473 (D. Nev. Apr. 20, 2009) 11

United States v. Kassouf,
144 F.3d 952 (6th Cir. 1998).....3, 5, 17

United States v. Kelly,
147 F.3d 172 (2d Cir. 1998).....3, 8, 9

United States v. Marinello,
839 F.3d 209 (2d Cir. 2016) 4, 8, 11, 18

United States v. Massey,
419 F.3d 1008, 1010 (9th Cir. 2005).....3

United States v. Miner,
774 F.3d 336 (6th Cir. 2014).....3

United States v. Mitchell,
985 F.2d 1275 (4th Cir. 1993).....7

Page

United States v. Popkin,
943 F.2d 1535 (11th Cir. 1991) 3, 11, 16

United States v. Reeves,
752 F.2d 995 (5th Cir. 1985) 19, 20, 21

United States v. Saldana,
427 F.3d 298 (5th Cir. 2005) 3, 9, 12

United States v. Santos,
553 U.S. 507 (2008) 7

United States v. Sorenson,
801 F.3d 1217 (10th Cir. 2015) ..... *passim*

United States v. Sun-Diamond Growers,
526 U.S. 398 (1999) 6

United States v. Williamson,
746 F.3d 987 (10th Cir. 2004) 10

United States v. Wilson,
118 F.3d 228 (4th Cir. 1997) 9, 11

United States v. Wiltberger,
18 U.S. 76 (1820) 7

United States v. Wood,
384 Fed. App'x. 698 (10th Cir. 2010) 16

Page

Yates v. United States,
135 S. Ct. 1074 (2015) 2

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 2 16

18 U.S.C. § 1503 ..... 18, 19

18 U.S.C. § 1956 16

26 U.S.C. § 6103 14

26 U.S.C. § 6531(6) 17

26 U.S.C. § 7201 ..... 4, 15

26 U.S.C. § 7202 15

26 U.S.C. § 7212 17

26 U.S.C. § 7212(a) ..... *passim*

26 U.S.C. § 7213 14

26 U.S.C. § 7701 8

Supreme Court Rule 37.2 1

Cited Authorities

Page

Eugene Volokh, *Is asking IRS agents to leak President Trump's tax return a crime (and constitutionally unprotected)?*, Wash. Post., Mar. 6, 2017 15

Julie R. O'Sullivan, *Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: The Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 673 (Winter 2006) 10

Kathryn Keneally, Column: White Collar Crime, 21 Champion 25 (Aug. 1997) 12

Kristen Hickman, *Of Lenity, Chevron, and KPMG*, 26 Va. Tax. Rev. 905 (2007).....7

Larry M. Eig, Congressional Research Service, Statutory Interpretation: General Principles and Recent Trends (Dec. 19, 2011).....18

BRIEF OF *AMICI CURIAE* CAUSE OF ACTION INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") and National Association of Criminal Defense Lawyers respectfully submit this *amici curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICI CURIAE*

Amicus curiae CoA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA Institute has a particular interest in challenging government overreach in the criminal justice system,

---

1. In accordance with Supreme Court Rule 37.2(a), CoA Institute notified the counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute and National Association of Criminal Defense Lawyers financially contributed to preparing this brief. The consents from the parties are being submitted herewith.

2. CoA Institute, *About*, http://www.causeofaction.org/about (last visited Apr. 21, 2017).

protecting the rule of law, and working to combat the criminalization of conduct that can be addressed through existing civil law—*i.e.*, the process of "overcriminalization." In order to fulfill this mission, CoA Institute has represented criminal defendants in federal court, *e.g.*, *United States v. Black*, No. CR 12-0002 (N.D. Cal.), appeared as *amicus curiae* in *Yates v. United States*, 135 S. Ct. 1074 (2015), and appeared as *amicus curiae* in other criminal matters before this court. *See, e.g.*, *DeCoster v. United States*, No. 16-877 (2017); *Overton v. United States*, No. 15-1504 (2017).

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL files numerous amici briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amici assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has an interest in ensuring the fair and just development of basic criminal law principles, including limits on prosecutorial discretion and upholding *mens rea* requirements. NACDL believes that this case presents an appropriate vehicle for the Court to clarify the prosecutorial limits and *mens rea* requirements of the "omnibus clause" of 26 U.S.C. § 7212(a).

SUMMARY OF ARGUMENT

The Sixth Circuit has cabined the "omnibus clause" of 26 U.S.C. § 7212(a) to limit its application to cases where

the defendant knew of an active Internal Revenue Service ("IRS") investigation. *United States v. Miner*, 774 F.3d 336 (6th Cir. 2014); *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998). Three other circuits, however, now joined by the Second Circuit, have expressly repudiated the Sixth Circuit's warning that failure to limit the omnibus clause would "open[] the statute to legitimate charges of overbreadth and vagueness," *Kassouff*, 144 F.3d at 958, and instead held that knowledge of a specific IRS investigation is not required for conviction under section 7212(a)'s omnibus clause. *See United States v. Floyd*, 740 F.3d 22, 32 (1st Cir. 2014); *United States v. Sorenson*, 801 F.3d 1217 (10th Cir. 2015); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005).

These circuits, taking false comfort in the bounds placed on the statute by the term "corruptly," have issued broad-sweeping interpretations of the same clause that transform it from a narrow obstruction statute into a catchall felony provision applicable in nearly any prosecution under Title 26.

While other felony provisions in Title 26 impose a "willfull" *mens rea* requirement, the omnibus clause punishes anyone who "corruptly" endeavors to obstruct or impede the administration of Title 26. 26 U.S.C. § 7212(a). To act "corruptly" is to act "with intent to gain an unlawful advantage or benefit for oneself or for another." *See, e.g.*, *Sorenson*, 801 F.3d at 1217; *United States v. Saldana*, 427 F.3d 298, 305 (5th Cir. 2005); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991).

As this otherwise statutorily-undefined term has been applied across the land, any act or omission that obstructs the administration of the tax code is a felony so long as the defendant committed that act or omission to gain an "unlawful benefit"—whether or not the defendant *knew* that benefit was unlawful, whether or not the act or omission itself is a legal act, and whether or not the unlawful benefit sought by the defendant was even related to the tax code. As interpreted by these circuit courts, the requirement that the defendant act "corruptly" is a *mens rea* requirement in name only, and one that fails to limit the reach of the omnibus clause in any meaningful manner.

This Court should grant certiorari to mend the circuit split, clarify the scope of conduct governed by 7212(a), and explain the applicable *mens rea* requirement that now threatens unconstitutionally "to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted." *See* Pet. App. 46a, *United States v. Marinello*, No. 15-2224, Denial of Rehearing En Banc (Jacobs, J., dissenting).

STATEMENT OF THE CASE

In *United States v. Marinello*, the United States obtained an indictment against Mr. Carlo J. Marinello, II, under 26 U.S.C. § 7212(a)'s "omnibus clause" of the criminal portion of the tax code, which makes it a felony to "in any other way corruptly . . . obstruct [] or impede [] or endeavor [] to obstruct or impede, the due administration of [Title 26]." Pet. App. 6a–7a. Although the tax code expressly sets forth numerous felonies, and requires the government to prove that the defendant "willfully" violated those statutes, *see, e.g.*, 26 U.S.C. § 7201, *et seq.*,

the government argued, and the Second Circuit agreed, that Mr. Marinello could be guilty of the felony of corruptly obstructing or impeding the administration of the tax code by performing acts as common as "failing to maintain corporate books and records for . . . his small business," "failing to provide [his] accountant with complete . . . information related to [his] personal income," and "discarding business records" because he performed these acts and omissions with the intent to obtain an unlawful benefit—not paying taxes. *See* Pet. App. 6a–7a, 32a–35a.

The Second Circuit declined to extend the holding in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), which would have required the government to prove that the defendant took action to impede or obstruct a pending IRS action in order to obtain a conviction under the omnibus clause. Pet. App. 23a–25a. Rejecting the Sixth Circuit's concerns of vagueness and overbreadth, the Second Circuit stated that the term "corruptly" sufficiently restricts the reach of the omnibus clause. Pet. App. 27a.

ARGUMENT

1. This Court Should Grant Certiorari because Under the Law in the Majority of Circuits, the "Corruptly" *Mens Rea* Requirement Fails to Limit the Reach of 26 U.S.C. § 7212(a)'s "Omnibus Clause."

This Court has interpreted omnibus clauses narrowly so as to limit their reach, ensure that the public is on fair notice of what the law requires, and to ensure limits to prosecutorial discretion in enforcing criminal laws. The Court should grant certiorari to reign in the scope of

conduct currently criminalizable under the omnibus clause as applied in four circuits.

A. This Court Has Routinely Cabined Omnibus Clauses.

This Court has interpreted omnibus provisions of this kind within the context of the statute in which the omnibus provision appears in order to limit its reach. *See, e.g., United States v. Aguilar*, 515 U.S. 593, 599–600 (1995) (interpreting a similarly-worded obstruction of justice "omnibus clause" to require a nexus in time, causation, or logic with a judicial proceeding, such that the defendant must have acted with an intent to influence known judicial or grand jury proceedings).

Further, this Court narrowly construes the language in criminal statutes to confine prosecutorial discretion. *McDonnell v. United States*, 136 S. Ct. 2355, 2368, 2372–73 (2016) (stating that "we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly'" and adopting a "bounded interpretation of 'official act'") (citations omitted); *see also United States v. Sun-Diamond Growers*, 526 U.S. 398, 408, 412 (1999) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions, and holding that "a statute . . . that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter").

This principle parallels the common law principle that courts must construe criminal statutes narrowly to afford fair notice of their provisions, *Augilar*, 515 U.S. at 600 (citing *McBoyle v. United States*, 283 U.S. 25, 27

(1931)), and that Congress, rather than other branches of the government, defines crimes. *Id.* at 600 (citing *Dowling v. United States*, 473 U.S. 207 (1985)).

If the text of the statute is unclear, the rule of lenity directs courts to interpret ambiguous criminal laws in favor of criminal defendants. *United States v. Wiltberger*, 18 U.S. 76 (1820). It requires that all uncertainties in a law with criminal applications be resolved in favor of the defendant. *United States v. Santos*, 553 U.S. 507, 514 (2008); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").[3] Moreover, in interpreting tax laws, this Court requires strict construction that tells against the government in any case of doubt. *Gould v. Gould*, 245 U.S. 151, 153 (1917).

In flagrant disregard for this Court's teachings, the majority of the circuit courts to review section 7212(a)'s omnibus clause have expressly interpreted it *broadly*. *See Sorenson*, 801 F.3d at 1225–26 ("we have favorably cited other cases broadly interpreting § 7212(a)'s omnibus clause"); *United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) ("the inclusion of the omnibus "in any other way" and "the due administration of this title" language encourage a broad rather than narrow construction"); *Popkin*, 943 F.2d at 1538.

---

3. *See* Kristen Hickman, *Of Lenity, Chevron, and KPMG*, 26 Va. Tax. Rev. 905 (2007) (In discussing the circumstances in which all of the *Chevron* and *Skidmore* deference doctrines will apply in civil law, "the Court has called for employing traditional canons of statutory construction in evaluating whether a statute's meaning is clear. In other words, as a canon of construction, the rule of lenity may operate as a tie-breaker between competing statutory interpretations to establish a statute's supposed plain meaning.").

Dismissing overbreadth and vagueness concerns, such courts, including the Second Circuit here, take comfort in the chimerical prosecutorial limits they derive from the statutorily-undefined requirement that the defendant have acted "corruptly" to obstruct the administration of the tax code. Pet. App. 27a, *United States v. Marinello*, 839 F.3d 209, 222 (2d Cir. 2016) ("other courts . . . have decided that section 7212(a)'s '*mens rea* requirement' sufficiently 'restricts the omnibus clause's reach only to conduct that is committed "corruptly"'"); *Kelly*, 147 F.3d at 176 (rejecting vagueness and overbreadth challenges to 7212(a) and agreeing with five other circuits in concluding that the use of the term "corruptly" in section 7212(a) does not render this provision unconstitutionally vague or overbroad (citing *United States v. Brennick*, 908 F. Supp. 1004, 1010–13 (D. Mass. 1995))).

This Court should intervene, however, as the cases demonstrate that the requirement that the defendant have acted "corruptly" does not actually require knowledge of anything, and as applied by these circuit courts does nothing to place a defendant on notice of what actions are criminal, or to curb the reach of the statute, or check prosecutorial discretion by limiting the conduct that is potentially criminalized.

B. The Definition of "Corruptly" Applied to 26 U.S.C. § 7212(a) Does Not Restrict the Application of the Statute in Any Meaningful Manner.

The term "corruptly" is not defined in the tax code. *See* 26 U.S.C. § 7701 (listing definitions). Under the definition adopted by most circuit courts, to act "corruptly" is to

"act with intent to gain an unlawful advantage or benefit either for oneself or for another." *See Sorenson*, 801 F.3d at 1225; *Saldana*, 427 F.3d at 305; *Kelly*, 147 F.3d at 177; *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997); *United States v. Hanson*, 2 F.3d 942, 946 (9th Cir. 1993); *Popkin*, 943 F.2d at 1540.

1. Whether the Defendant Had the "Intent to Obtain an Unlawful Benefit" Depends on Whether the Benefit Was Unlawful, Not on Whether the Defendant *Knew* the Benefit Was Unlawful.

The requirement that the defendant act "corruptly," as currently interpreted by some circuit courts, does not expressly require proof that the defendant *knew* the benefit he sought was unlawful. The "corruptly" *mens rea* requirement equates to a *mens rea* requirement in name only. It fails to comport with this Court's routinely-espoused scienter requirement. *See, e.g., Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (stating that it is a basic principle that "'wrongdoing must be conscious to the criminal'" and "a defendant must be 'blameworthy in mind' before he can be found guilty") (internal citations omitted); *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (stating that *mens rea* requirements "alleviate vagueness concerns" and "narrow the scope of the prohibition and limit prosecutorial discretion"); *United States v. Balint*, 258 U.S. 250, 251–52 (1922) ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it.").

In *United States v. Sorenson*, 801 F.3d 1217 (10th Cir. 2015), the defendant used a trust scheme to reduce his taxable assets by $1.5 million. He was indicted on one count—obstructing the administration of the tax code. At trial, Sorenson insisted that he did not know that the use of the trusts or the reduction in tax liability was unlawful and asked the District Court to instruct the jury that, to find him guilty, it must find that he *knew* the use of the trust scheme was illegal. *Id.* at 1229–30. The Court refused to give the instruction and the Tenth Circuit affirmed, stating that "as in *Williamson*, we need not decide" whether the definition of corruptly requires knowledge of illegality." *Id.* at 1230 (citing *United States v. Williamson*, 746 F.3d 987, 992 (10th Cir. 2004) (leaving "to another day whether a conviction under § 7212(a) requires that the defendant knew that the advantage or benefit he sought was unlawful")).

As Judge Jacobs warned, the line between "aggressive tax avoidance" and "corrupt obstruction" can be hard to discern and is often not clear. Pet. App. 45a. Under the "corruptly" standard, as it is currently applied, criminality hinges on the prosecutor's ability to show a benefit was unlawful, rather than the mental state of the defendant at the time of the act or omission. *See* Julie R. O'Sullivan, *Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: The Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 673 (Winter 2006) ("While it would be impossible—and counterproductive—to attempt to stamp out all prosecutorial discretion, there is clearly a point beyond which the code's empowerment of prosecutors is harmful . . . [and] many former prosecutors like me—believe that we have passed that tipping point by a substantial margin.").

2. Even Legal Acts or Omissions Can be Criminal.

The circuit majority also holds that under the "corruptly" standard, even lawful conduct is criminal if done with the intent to obtain an unlawful benefit. *See Wilson*, 118 F.3d at 234 (stating that "even legal actions [can] violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others"); *United States v. Bostian*, 59 F.3d 474, 479 (4th Cir. 1995) (posting an enlarged copy of a *lis pendens* violated 7212(a) where intended to impede the government's efforts to sell seized property); *Popkin*, 943 F.2d at 1540 (creating a company violated 7212(a) where "at least one intent in creating the corporation was to secure an unlawful benefit on his client"); *United States v. Kahre*, No. 2:05-cr-121, 2009 U.S. Dist. LEXIS 39473, at *9–11 (D. Nev. Apr. 20, 2009) (while buying property in a family member's name is not, in and of itself, illegal, defendants could properly be convicted under § 7212(a) if they were motivated by a desire "to secure an unlawful benefit for oneself or for another"); *United States v. Biller*, No. 1:06-cr-14, 2006 U.S. Dist. LEXIS 100493, at *13 (N.D. W. Va. July 17, 2006) ("The acts themselves need not be illegal. Even legal actions violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others.")

Under the Second Circuit's panel decision here, even doing nothing at all can be criminal if done with an intent to obtain an unlawful benefit. *Marinello*, 839 F.3d at 225 (holding that "an omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code").

3. The "Unlawful Benefit" Does Not Need to be a Tax Benefit.

Under the law in some circuits, the "unlawful benefit" sought by the defendant does not even need to be a benefit under the tax code. In other words, the omnibus clause could be used to prosecute a person who "obstructs the administration of Title 26" with the intent to seek *any* unlawful benefit. *United States v. Giambalvo*, 810 F.3d 1086, 1097 (8th Cir. 2016) (rejecting the argument that "the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage"); *Saldana*, 427 F.3d at 305 (holding that 7212(a) does not require that the defendant obtain benefits or advantages "under the tax laws" and upholding the conviction where Saldana filed reports with the IRS documenting false transactions with targeted individuals in astronomical amounts in the hope it would lead the IRS to audit those individuals); *United States v. Bowman*, 173 F.3d 595, 596–97 (6th Cir. 1999) ("affirming a defendant's conviction for violation of § 7212(a) when the defendant had filed false 1099 and 1096 forms for the sole purpose of intimidating and harassing his creditors" and finding that the defendant's conduct "fell within the ambit of § 7212(a)'s proscribed conduct even though he sought no financial advantage or benefit for himself under the tax laws").

In this regard, under current authority from the lower courts, the omnibus clause of section 7212(a) has reached far beyond conduct directed at IRS employees. *See* Kathryn Keneally, Column: White Collar Crime, 21 Champion 25, 26, 28 (Aug. 1997) (stating that "somewhat troubling[ly], however, the government and some courts have . . . expanded[ed] the reach of Section 7212(a) to

circumstances in which the harassing conduct was not directed at IRS employees, but at other government employees or private citizens," notwithstanding the DOJ Tax Division's policy directive (current as of 1997), limiting prosecutions to "conduct directed at IRS personnel in the performance of their duties, or in the context of an ongoing investigation or proceeding").

Similarly, prosecution under section 7212(a) does not require proof of a tax deficiency. *See Giambalvo*, 810 F.3d at 1097; *Floyd*, 740 F.3d at 32 ("A conviction for violation of section 7212(a) does not require proof of . . . a tax deficiency.").

C. The Prevailing § 7212(a) "Omnibus Clause" Interpretation Swallows the Remainder of the Criminal Provisions of Title 26 and Grants Prosecutors Unfettered Discretion.

Under the unbounded interpretations provided by the circuit majorities, doing something or doing nothing is a felony if it impedes the "administration of [the tax code]" so long as the defendant sought to obtain an unlawful benefit from the act or omission. The potential for felony prosecution under section 7212(a)'s omnibus clause is endless as it is currently applied by the majority of the circuits. A penal law is void for vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited or fails to establish guidelines to prevent arbitrary enforcement of the law. *City of Chicago v. Morales*, 527 U.S. 41, 64–65 (1999).

Under the regime, a prosecutor could charge a person under section 7212(a) for not providing his accountant travel receipts that implicated him in a crime, or for throwing away accounting documents that were relevant in a different lawsuit. For example, imagine that a CEO discards a travel receipt that would normally need to be documented by an accountant because that receipt places him at the scene of a crime. The CEO intended to obtain an unlawful benefit (destruction of evidence). But this is not the type of conduct that Congress anticipated could be prosecuted under 7212(a). *See United States v. Armstrong*, 974 F. Supp. 528, 531 (E.D. Va. 1997) (alleging the defendant violated the omnibus clause when he withheld his travel expense reimbursements from his tax return preparer).

Title 26 contains numerous provisions pertaining to the administration of the tax code that apply to corporations, nonprofit entities, charities, labor unions, and even government employees. For example, Congress protects the confidentiality of taxpayer information under Title 26 and an IRS employee has certain duties to maintain taxpayer confidentiality. *See* 26 U.S.C. § 6103; *id.* § 7213 (establishing criminal penalties for any IRS official that improperly discloses confidential taxpayer information). If a person emails an IRS official to procure the identity of a taxpayer, could this constitute the corrupt obstruction of the administration of Title 26 since the individual was seeking an unlawful benefit—the identity of a taxpayer? Similarly, there are questions left open under current interpretations as to whether an IRS official who actually disclosed taxpayer information could be prosecuted under section 7212(a)'s omnibus clause rather than section 7213 (which imposes a willfulness

requirement). *See* Eugene Volokh, *Is asking IRS agents to leak President Trump's tax return a crime (and constitutionally unprotected)*?, Wash. Post., Mar. 6, 2017, http://wapo.st/2oPUmmg (discussing journalist Nicholas Kristof's tweet encouraging IRS employees to mail him the President's tax returns).

Mr. Marinello was indicted for corruptly impeding the due administration of the tax code by failing to maintain "corporate books and records for . . . his small business," "failing to provide [his] accountant with complete . . . information related to [his] personal income," and "discarding business records" based on the government's accusations that Mr. Marinello did these acts (or omissions) with an intent to obtain an unlawful benefit (not paying taxes). *See* Pet. App. 6a–7a, 32a–35a.

The unlawful benefit Marinello sought to obtain—not paying taxes—is, of course, itself a felony under the tax code, but one that requires the government to prove a "willful" violation. *See, e.g.*, 26 U.S.C. § 7202 ("any person required under this title to . . . pay . . . any tax imposed by this title who willfully fails to . . . pay . . . such tax shall . . . be guilty of a felony"); *id.* § 7201 (stating that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony").

This heightened *mens rea* standard requires the government to prove a voluntary, intentional violation of a known legal duty. *Sorenson*, 801 F.3d at 1226. However, in this case, the government was able to obtain a felony conviction without proving that Mr. Marinello had knowledge that he was breaking the law. And similarly,

in *Sorenson*, the government was able to obtain a felony conviction arising out of conduct that amounted to tax evasion in the amount of $1.5 million under the omnibus clause of the obstruction statute, rather than the specific tax evasion code provision, without having to prove that Sorenson acted willfully. *Sorenson*, 801 F.3d at 1230; *see also United States v. Wood*, 384 Fed. App'x. 698, 704 (10th Cir. 2010) (holding that Mr. Wood acted with the intent to secure an unlawful benefit—non-payment of income taxes—without discussing that this, too, is a crime under Title 26 for which the government must prove a willful violation); *Popkin*, 943 F.2d at 1541–43 (Roney, J., dissenting) (stating that Popkin was guilty of a crime for setting up a corporation to hide income, but that crime was money laundering, 18 U.S.C. § 1956, or aiding and abetting tax fraud, 18 U.S.C. § 2, not obstruction under section 7212(a)).

This Court should grant Mr. Marinello's petition to address the circuit split and limit the reach of section 7212(a)'s omnibus clause in order to provide the public with clear notice of prohibited conduct and set meaningful limits on prosecutorial discretion for this obstruction statute.

II. The Court Should Grant Certiorari to Vindicate its Ruling in *Aguilar*.

In *United States v. Aguilar*, this Court imposed a "nexus" requirement to the obstruction of justice statute and supported a strict reading of obstruction statutes generally. 515 U.S. at 600. This Court should grant certiorari here to correct the lower courts' departure from this instruction.

When read in the context of the rest of the statute, the text of 7212(a)'s omnibus clause is properly cabined to apply only to known IRS actions or investigations, such that any criminal conduct must involve acts related to specific IRS agents or employees. *See Kassouff*, 144 F.3d at 956-958 (applying *United States v. Aguilar*, 515 U.S. 593 (1995)).[4]

This Court's reasoning in *Aguilar* is plainly germane here. Section 7212(a)'s omnibus clause at issue here states that:

> Whoever . . . corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title . . . [shall, upon conviction, be fined and imprisoned].

26 U.S.C. § 7212.

This matches almost precisely with the obstruction of justice omnibus clause interpreted in *Aguilar*, which states that:

> Whoever corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due

4. Indeed, even the statute of limitations for section 7212(a) recognizes that the proscribed conduct in 7212(a) relates "to intimidation of officers and employees of the United States." 26 U.S.C. § 6531(6).

> administration of justice . . . [shall be guilty of a felony].

18 U.S.C. § 1503. In *Aguilar*, this Court refused to parse words to untether the omnibus clause from the rest of the obstruction statute—which discussed jurors and existing judicial proceedings. Indeed, to do so would ignore the rule that, statutes are not read as a collection of isolated phrases. *Abuelhawa v. United States*, 556 U.S. 816, 819–820 (2009); *see also* Larry M. Eig, Congressional Research Service, Statutory Interpretation: General Principles and Recent Trends at 3 (Dec. 19, 2011), *available at* http://bit.ly/2oRyYP0 ("Under text-based analysis the cardinal rule of construction is that the whole statute should be drawn upon as necessary, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.").

Rejecting this approach, and even distinguishing *Aguilar* as "inapposite," Pet. App. 23a, *Marinello*, 839 F.3d at 209, the majority of the circuit courts have created a regime under section 7212(a)'s omnibus clause that is untethered from the remainder of the obstruction statute, which pertains to obstructing specific IRS officials and employees. 26 U.S.C. § 7212(a) (prohibiting endeavors to impede "any o*fficer or employee* of the United States acting in an official capacity under this title").[5] The Court

---

5. Section 7212(a) states in full: "Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede *any officer or employee* of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the

should not allow the circuits to weaken its teachings in *Aguilar* without correction.

Historically, the two statutes are bound. The *Reeves* Court, the first circuit court to interpret the provisions of 7212(a) in 1985 and establish the definition of "corruptly" now adopted by the majority of the circuit courts—actually formed this definition based on the definition developed in case law interpreting 18 U.S.C. § 1503—even while discussing the differences in the text of sections 7212(a) and 1503. *See United States v. Reeves*, 752 F.2d 995, 998-1001 (5th Cir. 1985).

The Fifth Circuit rejected a definition for "corruptly" requiring only "improper motive or bad or evil purpose" as insufficient to guard against vagueness concerns. *Id.* at 999–1000; *see also Brennick*, 908 F. Supp. at 1011-13 (summarizing the evolution of the definition of "corruptly" within the context of 7212(a) cases). Rather, the Fifth Circuit, relying on statutory interpretations of 18 U.S.C. § 1503, held that the government must prove that the defendant acted with "an intent to give some advantage inconsistent with the official duty and rights of others." *Reeves*, 752 F.2d at 999. The Court stated:

---

due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm *to the officer or employee of the United States or to a member of his family*" (emphasis added).

> We have found no cases interpreting the word "corruptly" in section 7212, but cases interpreting analogous sections of the United States Code have interpreted "corruptly" not to mean "with improper motive or bad or evil purpose." In the case most closely on point, *United States v. Ogle*, 613 F.2d 233 (10th Cir. 1979), the defendant contended that the jury instructions in that case "should have included reference to an evil motive, something bad, wicked or having an evil purpose." . . . The court disagreed, pointing out that "corruptly" is not used in this fashion in 18 U.S.C. § 1503, the statute at issue in that case. . . . Rather, it is directed to the effort to bring about a particular result such as affecting the verdict of a jury or the testimony of a witness.

Reeves, 752 F.2d at 998. Applying this reasoning from section 1503 cases, the *Reeves* court went on to caution that without the limit placed on section 1503 to apply it only to pending judicial actions, section 1503 could suffer from vagueness concerns, and that the same caution should be applied when approaching 7212(a) prosecutions:

> In addition, we have upheld section 1503 as not unconstitutional on vagueness grounds largely because the statute covers only actions related to pending judicial proceedings, thus providing adequate notice to potential violations . . . We have noted in the past that except for those narrow circumstances "we would tend to agree with the . . . claim that the statute 1503 is unconstitutionally vague."

Id. at 999–1000 (citations omitted).

When this Court interpreted and clarified the section 1503 omnibus clause in *Aguilar*, courts should have followed suit under the similarly worded section 7212(a) omnibus clause. This Court should intervene to address this variance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY T. GREEN
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street N.W.
Washington, D.C. 20036
(202) 872-8600

JOHN VECCHIONE*
ERICA L. MARSHALL
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
john.vecchione@causeofaction.org

Counsel for Amici Curiae

Counsel of Record

April 21, 2017